

Critical Race Theory

THE CUTTING EDGE

Edited by
Richard Delgado

TEMPLE UNIVERSITY PRESS  PHILADELPHIA

17 The Social Construction of Race

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UNDER the jurisprudence of slavery as it stood in 1806, one's status followed the maternal line. A person born to a slave woman was a slave, one born to a free woman was free. In that year, three generations of enslaved women sued for freedom in Virginia on the ground that they descended from a free maternal ancestor. Yet, on the all-important issue of their descent, their faces and bodies provided the only evidence they or the owner who resisted their claims could bring before the court.

The appellees . . . asserted this right [to be free] as having been descended, in the maternal line, from a free Indian woman; but their genealogy was very imperfectly stated. . . . [T]he youngest . . . [had] the characteristic features, the complexion, the hair and eyes . . . the same with those of whites. . . . Hannah, [the mother] had long black hair, was of the right Indian copper colour, and was generally called an Indian by the neighbours. . . .¹

Because the Wrights, grandmother, mother, and daughter, could not prove they had a free maternal ancestor, nor could their owner, Hudgins, show their descent from a female slave, the side charged with the burden of proof would lose. Allocating that burden required the court to assign the plaintiffs a race. Under Virginia law, Blacks were presumably slaves and thus bore the burden of proving a free ancestor; Whites and Indians were presumably free and thus the burden of proving their descent fell on those alleging slave status. In order to determine whether the Wrights were Black and presumptively slaves or Indian and presumptively free, the court, in the person of Judge Tucker, devised a racial test:

Nature has stamp'd upon the African and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of colour either disappears or becomes doubtful; a flat nose and woolly head of hair. The latter of these disappears the last of all; and so strong an ingredient in the African constitution is this latter character, that it predominates uniformly where the party is in equal degree descended from parents of different complexions, whether white or Indians. . . . So pointed is this distinction between the natives of Africa and the aborigines of America, that a man might as easily mistake the glossy, jetty clothing of an American bear for the wool of a black sheep, as the hair of an American Indian for that of an African, or the

²⁹ HARV. C.R.-C.L. L. REV. 1 (1994). Copyright © 1994 by the President and Fellows of Harvard College. Reprinted by permission.

descendant of an African. Upon these distinctions as connected with our laws, the burden of proof depends.²

The fate of the women rode upon the complexion of their face, the texture of their hair, and the width of their nose. Each of these characteristics served to mark their race, and their race in the end determined whether they were free or enslaved. The court decided for freedom:

[T]he witnesses concur in assigning to the hair of Hannah . . . the long, straight, black hair of the native aborigines of this country. . . .

[Verdict] pronouncing the appellees absolutely free . . .³

After unknown lives lost in slavery, Judge Tucker freed three generations of women because Hannah's hair was long and straight.

Introduction: The Confounding Problem of Race

I begin this chapter with *Hudgins v. Wright* in part to emphasize the power of race in our society. Human fate still rides upon ancestry and appearance. The characteristics of our hair, complexion, and facial features still influence whether we are figuratively free or enslaved. Race dominates our personal lives. It manifests itself in our speech, dance, neighbors, and friends—"our very ways of talking, walking, eating and dreaming are ineluctably shaped by notions of race."⁴ Race determines our economic prospects. The race-conscious market screens and selects us for manual jobs and professional careers, red-lines financing for real estate, green-lines our access to insurance, and even raises the price of that car we need to buy.⁵ Race permeates our politics. It alters electoral boundaries, shapes the disbursement of local, state, and federal funds, fuels the creation and collapse of political alliances, and twists the conduct of law enforcement.⁶ In short, race mediates every aspect of our lives.

Hudgins v. Wright also enables me to emphasize the role of law in reifying racial identities. By embalming in the form of legal presumptions and evidentiary burdens the prejudices society attached to vestiges of African ancestry, *Hudgins* demonstrates that the law serves not only to reflect but to solidify social prejudice, making law a prime instrument in the construction and reinforcement of racial subordination. Judges and legislators, in their role as arbiters and violent creators of the social order, continue to concentrate and magnify the power of race. Race suffuses all bodies of law, not only obvious ones like civil rights, immigration law, and federal Indian law, but also property law,⁷ contracts law,⁸ criminal law,⁹ federal courts,¹⁰ family law,¹¹ and even "the purest of corporate law questions within the most unquestionably Anglo scholarly paradigm."¹² I assert that no body of law exists untainted by the powerful astringent of race in our society.

In largest part, however, I begin with *Hudgins v. Wright* because the case provides an empirical definition of race. *Hudgins* tells us one is Black if one has a

single African antecedent, or if one has a "flat nose" or a "woolly head of hair." I begin here because in the last two centuries our conception of race has not progressed much beyond the primitive view advanced by Judge Tucker.

Despite the pervasive influence of race in our lives and in U.S. law, a review of opinions and articles by judges and legal academics reveals a startling fact: few seem to know what race is and is not. Today most judges and scholars accept the common wisdom concerning race, without pausing to examine the fallacies and fictions on which ideas of race depend. In U.S. society, "a kind of 'racial etiquette' exists, a set of interpretive codes and racial meanings which operate in the interactions of daily life Race becomes 'common sense'—a way of comprehending, explaining and acting in the world."¹³ This social etiquette of common ignorance is readily apparent in the legal discourse of race. Rehnquist-Court Justices take this approach, speaking disingenuously of the peril posed by racial remediation to "a society where race is irrelevant," while nevertheless failing to offer an account of race that would bear the weight of their cynical assertions.¹⁴ Arguably, critical race theorists, those legal scholars whose work seems most closely bound together by their emphasis on the centrality of race, follow the same approach when they powerfully decry the permanence of racism and persuasively argue for race consciousness, yet do so without explicitly suggesting what race might be.¹⁵ Race may be America's single most confounding problem, but the confounding problem of race is that few people seem to know what race is.

In this essay, I define a "race" as a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry. I argue that race must be understood as a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, faces, and personal characteristics. In other words, social meanings connect our faces to our souls. Race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing, plastic process subject to the macro forces of social and political struggle and the micro effects of daily decisions. As used here, the referents of terms like Black and White are social groups, not genetically distinct branches of humankind.

Note that Whites exist as a race under this definition. It is not only people of color who find their identities mediated by race, or who are implicated in the building and maintenance of racial constructs. White identity is just as much a racial fabrication, and Whites are equally, or even more highly, implicated in preserving the racially constructed status quo. I therefore explicitly encourage Whites to critically attend to racial constructs. Whites belong among those most deeply dedicated to fathoming the intricacies of race.

In this context, let me situate the theory I advance in terms of the epistemological significance of my own race and biography. I write as a Latino. The arguments I present no doubt reflect the less pronounced role physical features and ancestry play for my community as opposed to Blacks, the group most often considered in the elaboration of racial theories. Perhaps more importantly, I write

from a perspective influenced by a unique biography. My older brother, Garth, and I are the only children of a fourth-generation Irish father, Terrence Eugene Haney, and a Salvadoran immigrant mother, Maria Daisy López de Haney. Sharing a similar morphology, Garth and I both have light but not white skin, dark brown hair, and dark brown eyes. We were raised in Hawaii, far from either my father's roots in Spokane, Washington, or my mother's family in San Salvador, El Salvador. Interestingly, Garth and I conceive of ourselves in different racial terms. For the most part, he considers his race transparent, something of a non-issue in the way Whites do, and he relates most easily with the Anglo side of the family. I, on the other hand, consider myself Latino and am in greatest contact with my maternal family. Perhaps presciently, my parents gave Garth my paternal grandfather's name, Mark, for a middle name, thus christening him Garth Mark Haney. They gave me my maternal father's name, Fidencio. Affiliating with the Latino side of the family, in my first year of graduate school I followed Latino custom by appending my mother's family name to my own, rendering my name Ian Fidencio Haney López. No doubt influencing the theories of race I outline and subscribe to, in my experience race reveals itself as plastic, inconstant, and to some extent volitional. That is the thesis of this chapter.

Biological Race

There are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites.¹⁶ One's race is not determined by a single gene or gene cluster, as is, for example, sickle-cell anemia. Nor are races marked by important differences in gene frequencies, the rates of appearance of certain gene types. The data compiled by various scientists demonstrate, contrary to popular opinion, that intra-group differences exceed inter-group differences. That is, greater genetic variation exists *within* the populations typically labeled Black and White than *between* these populations.¹⁷ This finding refutes the supposition that racial divisions reflect fundamental genetic differences.

Rather, the notion that humankind can be divided along White, Black, and Yellow lines reveals the social rather than the scientific origin of race. The idea that there exist three races, and that these races are "Caucasoid," "Negroid," and "Mongoloid," is rooted in the European imagination of the Middle Ages, which encompassed only Europe, Africa, and the Near East. This view found its clearest modern expression in Count Arthur de Gobineau's *Essay on the Inequality of Races*, published in France in 1853–55.¹⁸ The peoples of the American continents, the Indian subcontinent, East Asia, Southeast Asia, and Oceania—living outside the imagination of Europe and Count Gobineau—are excluded from the three major races for social and political reasons, not for scientific ones. Nevertheless, the history of science has long been the history of failed efforts to justify these social beliefs.¹⁹ Along the way, various minds tried to fashion practical human typolo-

gies along the following physical axes: skin color, hair texture, facial angle, jaw size, cranial capacity, brain mass, frontal lobe mass, brain surface fissures and convolutions, and even body lice. As one scholar notes, "[t]he nineteenth century was a period of exhaustive and—as it turned out—futile search for criteria to define and describe race differences."²⁰

To appreciate the difficulties of constructing races solely by reference to physical characteristics, consider the attempt to define race by skin color. On the basis of white skin, for example, one can define a race that includes most of the peoples of Western Europe. However, this grouping is threatened by the subtle gradations of skin color as one moves south or east, and becomes untenable when the fair-skinned peoples of Northern China and Japan are considered. In 1922, in *Ozawa v. United States*,²¹ the Supreme Court nicely explained this point. When Japanese-born Takao Ozawa applied for citizenship he asserted, as required by the Naturalization Act, that he was a "white person." Counsel for Ozawa pointedly argued that to reject Ozawa's petition for naturalization would be "to exclude a Japanese who is 'white' in color." This argument did not persuade the Court: "Manifestly, the test [of race] afforded by the mere color of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races."²² In rejecting Ozawa's petition for citizenship, the Court recognized that racial boundaries do not in fact follow skin color. If they did, some now secure in their White status would have to be excluded, and others firmly characterized as non-Whites would need to be included. As the *Ozawa* Court correctly tells us, "mere color of the skin" does not provide a means to racially divide people.

The rejection of race in science is now almost complete. In the end, we should embrace historian Barbara Fields's succinct conclusion with respect to the plausibility of biological races: "Anyone who continues to believe in race as a physical attribute of individuals, despite the now commonplace disclaimers of biologists and geneticists, might as well also believe that Santa Claus, the Easter Bunny and the tooth fairy are real, and that the earth stands still while the sun moves."²³

Racial Illusions

Unfortunately, few in this society seem prepared to relinquish fully their subscription to notions of biological race. This includes Congress and the Supreme Court. Congress' anachronistic understanding of race is exemplified by a 1988 statute that explains that "the term 'racial group' means a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent."²⁴ The Supreme Court, although purporting to sever race from biology, also seems incapable of doing so. In *Saint Francis College v. Al-*

Khazraji,²⁵ the Court determined that an Arab could recover damages for racial discrimination under 42 U.S.C. § 1981. Writing for the Court, Justice White appeared to abandon biological notions of race in favor of a sociopolitical conception, explaining: "Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the 'average' individuals of different races."²⁶ Despite this seeming rejection of biological race, Justice White continued: "The Court of Appeals was thus quite right in holding that § 1981, 'at a minimum,' reaches discrimination against an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*.'"²⁷ By adopting the lower court's language of genetics and distinctive subgroupings, Justice White demonstrates the Court's continued reliance on blood as a metonym for race. During oral argument in *Metrobroadcasting v. FCC*, Justice Scalia again revealed the Court's understanding of race as a matter of blood. Scalia attacked the argument that granting minorities broadcasting licenses would enhance diversity by blasting "the policy as a matter of 'blood,' at one point charging that the policy reduced to a question of 'blood . . . blood, not background and environment.'"²⁸

Racial Formation

Race must be viewed as a social construction. That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization. The process by which racial meanings arise has been labeled racial formation.²⁹ In this formulation, race is not a determinant or a residue of some other social phenomenon, but rather stands on its own as an amalgamation of competing societal forces. Racial formation includes both the rise of racial groups and their constant reification in social thought. I draw upon this theory, but use the term "racial fabrication" in order to highlight four important facets of the social construction of race. First, humans rather than abstract social forces produce races. Second, as human constructs, races constitute an integral part of a whole social fabric that includes gender and class relations. Third, the meaning-systems surrounding race change quickly rather than slowly. Finally, races are constructed relationally, against one another, rather than in isolation. Fabrication implies the workings of human hands, and suggests the possible intention to deceive. More than the industrial term "formation," which carries connotations of neutral constructions and processes indifferent to individual intervention, referring to the fabrication of races emphasizes the human element and evokes the plastic and inconstant character of race. An archaeological exploration of the racial identity of Mexicans will illustrate these four elements of race.

In the early 1800s, people in the United States ascribed to Latin Americans

nationalities and, separate from these, races. Thus, a Mexican might also be White, Indian, Black, or Asian. By the 1840s and 1850s, however, U.S. Anglos looked with distaste upon Mexicans in terms that conflated and stigmatized their race and nationality. This animus had its source in the Anglo-Mexican conflicts in the Southwest, particularly in Texas and California. In the newly independent Texas, war propaganda from the 1830s and 1840s purporting to chronicle Mexican "atrocities" relied on racial disparagements. Little time elapsed following the U.S. annexation of Mexican territory in 1848 before laws began to reflect and reify Anglo racial prejudices. Social prejudices quickly became legal ones, highlighting the close ties between race and law. In 1855, for example, the California Legislature targeted Mexicans as a racial group with the so-called "Greaser Act." Ostensibly designed to discourage vagrancy, the law specifically applied to "all persons who are commonly known as 'Greasers' or the issue of Spanish and Indian blood . . . and who go armed and are not peaceable and quiet persons."³⁰

Typifying the arrogant belligerence of the times are the writings of T. J. Farnham: No one acquainted with the indolent, mixed race of California, will ever believe that they will populate, much less, for any length of time, govern the country. The law of Nature which curses the mulatto here with a constitution less robust than that of either race from which he sprang, lays a similar penalty upon the mingling of the Indian and white races in California and Mexico. They must fade away; while the mixing of different branches of the Caucasian family in the States will continue to produce a race of men, who will enlarge from period to period the field of their industry and civil domination, until not only the Northern States of Mexico, but the Californias also, will open their glebe to the pressure of its unconquered arm. The old Saxon blood must stride the continent, must command all its northern shores, must here press the grape and the olive, here eat the orange and the fig, and in their own unaided might, erect the altar of civil and religious freedom on the plains of the Californias.³¹

We can use Farnham's racist hubris to illustrate the four points enumerated earlier regarding racial fabrication.

First, the transformation of "Mexican" from a nationality to a race came about through the dynamic interplay of myriad social forces. As the various strains in this passage indicate, Farnham's racialization of Mexicans does not occur in a vacuum, but in the context of dominant ideology, perceived economic interests, and psychological necessity. In unabashedly proclaiming the virtue of raising industry and harnessing nature, Farnham trumpeted the dominant Lockean ideology of the time, an ideology which served to confirm the superiority of the industrialized Yankees and the inferiority of the pastoral Mexicans and Indians, and to justify the expropriation of their lands.³² By lauding the commercial and economic interests of colonial expansion, Farnham also appealed to the free-booting capitalist spirit of America, recounting to his East Coast readers the riches which lay for their taking in a California populated only by mixed-breed

Mexicans. Finally, Farnham's assertions regarding the racial character of these Mexicans filled the psychological need to justify conquest: the people already in California, Farnham assured his readers, would "fade away" under Nature's curse, and in any event, were as a race "unfit" to govern their own land. Racial fabrication cannot be explained in terms of a few causal factors, but must be viewed as a complex process subject to manifold social forces.

Second, because races are constructed, ideas about race form part of a wider social fabric into which other relations, not least gender and class, are also woven. Farnham's choice of martial and masculine imagery is not accident but a reflection of the close symbiosis in the construction of racial and gender hierarchies during the nineteenth century.³³ This close symbiosis was reflected, for example, in distinct patterns of gender racialization during the era of frontier expansion—the native men of the Southwest were depicted as indolent, slothful, cruel, and cowardly Mexicans, while the women were described as fair, virtuous, and lonely Spanish maidens. Consider the following leaden verse:

The Spanish maid, with eye of fire,
At balmy evening turns her lyre
And, looking to the Eastern sky,
Awaits our Yankee chivalry
Whose purer blood and valiant arms,
Are fit to clasp her budding charms.

The *man*, her mate, is sunk in sloth—
To love, his senseless heart is loth:
The pipe and glass and tinkling lute,
A sofa, and a dish of fruit;
A nap, some dozen times by day;
Somber and sad, and never gay.³⁴

This doggerel depicts the Mexican women as Spanish, linking their sexual desirability to European origins, while concurrently comparing the purportedly slothful Mexican man to the ostensibly chivalrous Yankee. Social renditions of masculinity and femininity often carry with them racial overtones, just as racial stereotypes invariably embody some elements of sexual identity. The archaeology of race soon becomes the excavation of gender and sexual identity.

Farnham's appeal to industry also reveals the close interconnection between racial and class structures. The observations of Arizona mine owner Sylvester Mowry reflect this linkage: "The question of [resident Mexican] labor is one which commends itself to the attention of the capitalist: cheap, and under proper management, efficient and permanent. They have been peons for generations. They will remain so, as it is their natural condition."³⁵ When Farnham wrote in 1840 before U.S. expansion into the Southwest, Yankee industry stood in counterpoint to Mexican indolence. When Mowry wrote in 1863, after fifteen years of U.S. regional control, Anglo capitalism stood in a fruitful managerial relationship to cheap, efficient Mexican labor. The nearly diametric change in the conception

of Mexicans held by Anglos, from indolent to industrious, reflects the emergence of an Anglo economic elite in the Southwest and illustrates the close connection between class relations and ideas about race. The syncretic nature of racial, gender, and class constructs suggests that a global approach to oppression is not only desirable, it is *necessary* if the amelioration of these destructive social hierarchies is to be achieved.

Third, as evidenced through a comparison of the stereotypes of Mexicans propounded by Farnham and Mowry, racial systems of meaning can change at a relatively rapid rate. In 1821, when Mexico gained its independence, its residents were not generally considered a race. Twenty years later, as Farnham's writing shows, Mexicans were denigrated in explicitly racial terms as indolent cowards. About another two decades after that, Mowry lauds Mexicans as naturally industrious and faithful. The rapid emergence of Mexicans as a race, and the similarly quick transformations wrought in their perceived racial character, exemplify the plasticity of race. Accretions of racial meaning are not sedimentary products which once deposited remain solid and unchanged, or subject only to a slow process of abrasion, erosion, and buildup. Instead, the processes of racial fabrication continuously melt down, mold, shatter, and recast races: races are not rocks, they are plastics.

Fourth and finally, races are relationally constructed. Despite their conflicting views on the work ethic of Mexicans, the fundamental message delivered by Farnham and Mowry is the same: though war, conquest, and expansion separate their writings, both tie race and class together in the exposition of Mexican inferiority and Anglo superiority. The denigration of Mexicans and the celebration of Anglos are inseparable. The attempt to racially define the conquered, subjugated, or enslaved is at the same time an attempt to racially define the conqueror, the subjugator, or the enslaver.³⁶ Races are categories of difference which exist only in society: they are produced by myriad conflicting social forces; they overlap and inform other social categories; they are fluid rather than static and fixed; and they make sense only in relationship to other racial categories, having no meaningful independent existence. Race is socially constructed.

Conclusion

I close where I began, with *Hudgins v. Wright*. The women in that case lived in a liminal area between races, being neither and yet both Black and Indian. Biologically, they were neither. Any objective basis for racial divisions fell into disrepute a hundred years ago, when early ethnology proved incapable of delineating strict demarcations across human diversity. Despite Judge Tucker's beliefs and the efforts of innumerable scientists, the history of nineteenth-century anthropology convincingly demonstrates that morphological traits cannot be employed as physical arbiters of race. More recently, genetic testing has made clear the close connection all humans share, as well as the futility of explaining those

differences that do exist in terms of racially relevant gene codes. The categories of race previously considered objective, such as Caucasoid, Negroid, and Mongoloid, are now widely regarded as empty relics, persistent shadows of the social belief in races that permeated early scientific thought. Biological race is an illusion.

Social race, however, is not, and it is here that the Wrights' race should be measured. At different times, the Wrights were socially both Black and Indian. As slaves and in the mind of Hudgins, they were Black; as free women and in their argument for liberty, they were Indian. The particular racial options confronting the Wrights reflect the history of racial fabrication in the United States. Races are thus not biological groupings, but social constructions. Even though far from objective, race remains obvious. Walking down the street, we consistently rely on pervasive social mythologies to assign races to the other pedestrians. The absence of any physical basis to race does not entail the conclusion that race is wholly hallucination. Race has its genesis and maintains its vigorous strength in the realm of social beliefs.

For the Wrights, their race was not a phantasm but a contested fact on which their continued enslavement turned. Their struggle makes clear the importance of chance, context, and choice in the social mechanics of race. Aspects of human variation like dark skin or African ancestry are chance, not denotations of distinct branches of humankind. These elements stand in as markers widely interpreted to connote racial difference only in particular social contexts. The local setting in turn provides the field of struggle on which social actors make racially relevant choices. For the Wrights, freedom came because they chose to contest their race. Without their decision to argue that they were Indian and thus free, generations to come might have been reared into slavery.

This is the promise of choice at its brightest: by choosing to resist racial constructions, we may emancipate ourselves and our children. Unfortunately, uncoerced choice in the arena of U.S. race relations is rare, perhaps nonexistent. Two facets of this case demonstrate the darkened potential of choice. First, the women's freedom ultimately turned on Hannah's long straight hair, not on their decision to resist. Without the legal presumptions that favored their features, presumptions that were in a sense the concrete embodiments of the social context, they would have remained slaves. Furthermore, these women challenged their race, not the status ascribed to it. By arguing that they were Indian and not Black, free rather than enslaved, the women lent unfortunate legitimacy to the legal and social presumptions in favor of Black slavery. The context and consequences of the Wrights' actions confirm that choices are made in a harsh racist social setting that may facilitate but more likely will forestall freedom; and that in our decisions to resist, we may shatter but more probably will inadvertently strengthen the racial structures around us. Nevertheless, race is not an inescapable physical fact. Rather, it is a social construction that, however perilously, remains subject to contestation at the hands of individuals and communities alike.

NOTES

1. *Hudgins v. Wright*, 11 Va. 134 (1 Hen. & M.) (Sup. Ct. App. 1806).
2. *Id.* at 139-40.
3. *Id.* at 140-41.
4. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980s* 63 (1986).
5. See Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).
6. See, e.g., *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988).
7. See, e.g., Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1521-26 (1991).
8. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).
9. See, e.g., Randall Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); *Developments in the Law*, *supra* note 6.
10. See, e.g., Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).
11. See, e.g., Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PENN. L. REV. 1163 (1991); Twila Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51 (1990-91).
12. Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 729 (citing Baeza, *Telecommunications Reregulation and Deregulation: The Impact on Opportunities for Minorities*, 2 HARV. BLACKLETTER J. 7 (1985)).
13. OMI & WINANT, *supra* note 4, at 62. For an extended discussion of "common sense" in the construction of racial identities, see Stuart Alan Clarke, *Fear of a Black Planet: Race, Identity Politics, and Common Sense*, 21 SOCIALIST REV. No. 3-4, 37 (1991).
14. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505 (1989). For a critique of Justice O'Connor's decision in *Croson*, see Patricia J. Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).
15. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); and Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.
16. See generally LEON KAMIN ET AL., *NOT IN OUR GENES: BIOLOGY, IDEOLOGY, AND HUMAN NATURE* (1984); Alan Almquist & John Cronin, *Fact, Fancy and Myth on Human Evolution*, 29 CURRENT ANTHROPOLOGY 520 (1988); and Bruce Bower, *Race Falls from Grace*, 140 SCI. NEWS 380 (1991).
17. See Richard C. Lewontin, *The Apportionment of Human Diversity*, 6 EVOLUTIONARY BIOLOGY 381, 397 (1972). See generally L. L. Cavalli-Sforza, *The Genetics of Human Populations*, 231 SCI. AM. 80 (Sept. 1974).
18. THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* 342-47 (1975).

19. See generally STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (1981); WILLIAM STANTON, *THE LEOPARD'S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA 1815-59* (1960); and NANCY STEPAN, *THE IDEA OF RACE IN SCIENCE: GREAT BRITAIN, 1800-1960* (1982).

20. GOSSETT, *supra* note 18, at 65-83. Charles Darwin proposed several of these axes, arguing at one point that "[w]ith civilized nations, the reduced size of the jaws from lessened use, the habitual play of different muscles serving to express different emotions, and the increased size of the brain from greater intellectual activity, have together produced a considerable effect on their general appearance in comparison with savages." *Id.* at 78 (quoted without attribution to a specific source). Darwin also supposed that the body lice of some races could not live on the bodies of members of other races, thus prompting him to suggest that "a racial scale might be worked out by exposing doubtful cases to different varieties of lice." *Id.* at 81. Leonardo da Vinci is another icon of intellectual greatness guilty of harboring ridiculous ideas regarding race. Da Vinci attributed racial differences to the environment in a novel manner, arguing that those who lived in hotter climates worked at night and so absorbed dark pigments, while those in cooler climates were active during the day and correspondingly absorbed light pigments. *Id.* at 16.

21. 260 U.S. 178 (1922).

22. *Id.* at 197.

23. See Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT REV. 95-96 (1990).

24. Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1093 (1988).

25. 481 U.S. 604 (1987).

26. *Id.* at 610, n.4.

27. *Id.* at 613.

28. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 32 (1991) (citing Ruth Marcus, *FCC Defends Minority License Policies: Case Before High Court Could Shape Future of Affirmative Action*, WASH. POST, Mar. 29, 1990, at A8).

29. OMI & WINANT, *supra* note 4, at 61.

30. Cal. Stat. 175 (1855), excerpted in ROBERT F. HEIZER & ALAN J. ALMQUIST, *THE OTHER CALIFORNIANS: PREJUDICE AND DISCRIMINATION UNDER SPAIN, MEXICO, AND THE UNITED STATES TO 1920*, at 151 (1971). The recollections of "Dame Shirley," who resided in a California mining camp between 1851 and 1852, record efforts by the ascendant Anglos to racially denigrate Mexicans. "It is very common to hear vulgar Yankees say of the Spaniards, 'Oh, they are half-civilized black men!' These unjust expressions naturally irritate the latter, many of whom are highly educated gentlemen of the most refined and cultivated manner." L.A.K.S. CLAPPE, *THE SHIRLEY LETTERS FROM THE CALIFORNIA MINES, 1851-1852*, at 158 (1922), quoted in HEIZER & ALMQUIST, *supra* at 141.

31. T. J. FARNHAM, *LIFE, ADVENTURES, AND TRAVEL IN CALIFORNIA* 413 (1840), quoted in HEIZER & ALMQUIST, *supra* note 30, at 140.

32. See generally Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

33. See Nancy Leys Stepan, *Race and Gender: The Role of Analogy in Science*, in ANATOMY OF RACISM 38 (David Theo Goldberg ed., 1990).

34. REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* 233 (1981) (citation omitted).

35. SYLVESTER MOWRY, *THE GEOGRAPHY OF ARIZONA AND SONORA* 67 (1863), quoted in RONALD TAKAKI, *IRON CAGES: RACE AND CLASS IN NINETEENTH CENTURY AMERICA* 163 (1990).

36. See Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1373 (1988).